The New Straits Times Press (M) Bhd & Ors v Ahirudin bin Attan

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–25–28 OF 2007
MOHD HISHAMUDIN J
21 NOVEMBER 2007

Civil Procedure — Contempt of court — Committal proceedings — Breach of undertaking — Whether grounds which applicants intended to rely on must be set out in supporting statement itself and not merely be explained separately by way of submission by counsel — Rules of the High Court 1980 O 52 r 2

Civil Procedure — Contempt of court — Committal proceedings — Breach of undertaking not to publish comments which may prejudice fair trial of action — Whether linking of respondent's weblog to third party's weblog which commented on the trial amounted to breach of undertaking — Rules of the High Court 1980 O 52 r 2

The first applicant's primary business was the publishing and selling of newspapers, including the *New Straits Times* and the *New Sunday Times*. The applicants had jointly commenced an action for libel and malicious falsehood against the respondent via High Court, Kuala Lumpur, Civil Suit No S3–23–2 of 2007 ('the S3 suit'). The claim was in relation to various articles, comments and posts published by the respondent on his weblog called the 'Rocky's Bru' weblog. The plaintiffs in the S3 action have applied for an interlocutory injunction to restrain the respondent from posting further or similar allegedly libelous statements concerning the plaintiffs. As the interlocutory injunction application was pending, all parties in the S3 suit agreed to henceforth not publish any articles, comments or posts regarding the dispute presently before the High Court in this action that may be regarded as sub judice or that may prejudice the fair trial of the action ('the undertaking'). The applicants in this ex parte application applied leave to commence committal proceedings pursuant to O 52 r 2 of the Rules of the High Court 1980 against the respondent on the two grounds: (1) that there was a breach of the respondent's undertaking; and (2) that the respondent's action of linking his weblog 'Rocky's Bru' to another weblog called 'Walk With Us'. The applicants maintained that the respondent's act in referring to and linking to the 'Walk With Us' weblog from his Rocky's Bru weblog, was a re-publication of the contents of the 'Walk With Us' weblog on the Rocky's

Bru weblog. It was alleged by the applicants that the 'Walk With Us' weblog contains discussions of the S3 suit and criticisms of the plaintiffs (the applicants) in that suit (and, to a lesser extent, criticisms of the plaintiffs' solicitors and counsel).

Held, dismissing the application:

(1) The applicants had failed to explain clearly in what way that the articles and posts were of such a nature that they could be said to be 'regarding the dispute presently before the High Court'; or, even assuming that they could be said to be 'regarding the dispute presently before the High Court', in what way that they could be regarded as being sub judice or that they may prejudice the fair trial of the action. Rule 2(2) of O 52 requires the applicants to set out in the supporting statement the grounds on which the committal was sought. In the present case the applicants had not explained the grounds clearly. There was lacking in sufficient information (see para 14).

(2) In an ex parte application for leave to institute committal proceeding, the details and the comparisons, which the applicants intend to rely on, must be set out in the supporting statement itself and not to be explained separately by way of submission by counsel from the bar (be it orally or in writing). Every essential particular must be in the supporting statement itself and verified by an affidavit. These requirements must be strictly complied with. In any case, the skeletal written submission tendered by the learned counsel for the applicants on the day of the hearing did not appear to contain the details or comparisons (see para 16).

(3) The respondent could not be held liable over the contents of the 'Walk With Us' weblog. He was neither the author nor the publisher of that weblog. The 'Walk With Us' weblog was an anonymous weblog. It was farfetched to contend that although the respondent was not the author of the 'Walk With Us' weblog, nonetheless, he must, as a matter of law, be taken to be the publisher of that weblog by reason of the hyperlink on his weblog which linked the 'Walk With Us' weblog with his weblog; there was a republication by the respondent merely by reason of the hyperlink appearing in his weblog. In the present case, however, there was only a 'passive' reference to the hyperlink: only the name/title of the hyperlink 'Walk With Us' appears on the right hand column of the weblog together with the names/titles of about 85 other hyperlinks (see paras 19–20 & 22).

[Bahasa Malaysia summary

Perniagaan utama pemohon pertama adalah menerbitkan dan menjual surat

khabar, termasuklah *New Straits Times* dan New Sunday Times. Pemohon-pemohon telah bersama memulakan satu tindakan libel dan pemalsuan berniat jahat terhadap responden melalui Mahkamah Tinggi, Kuala Lumpur, Guaman Sivil No S3-23-2-2007 ('guaman S3'). Tuntutan adalah berkaitan pelbagai artikel, komen dan pengumuman yang telah diterbitkan oleh responden di blog web beliau yang dikenali sebagai blog web 'Rocky's Bru'. Plaintif-plaintif dalam tindakan S3 telah memohon untuk satu injunksi interlokutori untuk menghalang responden daripada mengumumkan kenyataan-kenyataan lain atau serupa yang dikatakan bersifat libel berkaitan plaintif-plaintif. Memandangkan permohonan injunksi interlokutori belum selesai, kesemua pihak dalam guaman S3 bersetuju untuk tidak lagi menerbitkan apa-apa artikel, komen atau pengumuman berhubung pertikaian yang kini di hadapan Mahkamah Tinggi dalam tindakan ini yang mungkin dianggap sebagai sub judice — suatu yang sedang dipertimbangkan oleh mahkamah dan oleh itu tidak boleh diperkatakan di khalayak ramai — atau yang boleh memprejudiskan perbicaraan adil tindakan tersebtu ('akujanji itu'). Pemohon-pemohon dalam permohonan ex parte ini memohon kebenaran untuk memulakan prosiding komital menurut A 52 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 terhadap responden atas dua alasan: (1) bahawa terdapat kemungkiran akujanji responden tersebut; dan (2) bahawa tindakan responden mengaitkan blog web 'Rocky's Bru' beliau dengan blog web dikenali sebagai 'Walk With Us'. Pemohon-pemohon menegaskan bahawa tindakan responden yang merujuk dan mengaitkan blog web 'Walk With Us' dengan blog web Rocky's Bru beliau, adalah merupakan satu penerbitan semula kandungan blog web 'Walk With Us' ke dalam blog web Rocky's Bru. Ia dikatakan oleh pemohon-pemohon bahawa blog web 'Walk With Us' mengandungi rundingan tentang guaman S3 dan kritikan plaintif-plaintif (pemohon-pemohon) dalam guaman tersebut (dan, beberapa kritikan-kritikan peguam plaintif-plaintif).

Diputuskan, menolak permohonan tersebut:

(1) Pemohon-pemohon telah gagal untuk menjelaskan bagaimana artikel-artikel dan pengumuman tersebut bersifat sedemikian sehingga boleh dikatakan sebagai 'regarding the dispute presently before the High Court'; dalam cara apa yang ia dianggap sebagai sub judice atau bahawa ia boleh menprejudiskan perbicaraan adil tindakan tersebut. Kaedah 2(2) kepada A 52 menghendaki pemohon-pemohon menyatakan dalam penyataan sokongan alasan-alasan kenapa komital dipohon. Dalam kes semasa pemohon-pemohon tidak menjelaskan alasan-alasan tersebut. Terdapat maklumat yang tidak lengkap (lihat perenggan).

(2) Dalam satu permohonan ex parte untuk kebenaran memulakan prosiding komital, butiran dan perbandingan, yang pemohon-pemohon berniat untuk menggunakannya, hendaklah dinyatakan dalam penyataan sokongan itu dan tidak perlu dijelaskan secara berasingan melalui hujah peguam (maupun secara lisan ataupun bertulis). Setiap butiran penting mesti di masukkan dalam penyataan sokongan dan disahkan dengan satu afidavit. Keperluan tersebut hendaklah dipatuhi dengan ketat. Dalam apa keadaan, rangka hujah bertulis yang ditenderkan oleh peguam yang bijaksana bagi pihak pemohon-pemohon pada hari perbicaraan tidak mengandungi butiran atau perbandingan tersebut (lihat perenggan).

(3) Responden tidak boleh dipertanggungjawabkan ke atas kandungan blog web 'Walk With Us. Beliau bukan penulis maupun penerbit blog web tersebut. Blog web ' Walk With Us' merupakan satu blog web tanpa nama (lihat perenggan). Sukar untuk menegaskan bahawa meskipun responden bukan penulis blog web 'Walk With Us', namun beliau hendaklah, dari segi undang-undang, dianggap sebagai penerbit blog web tersebut oleh kerana penghubung yang terdapat dalam blog web beliau (lihat perenggan). Dalam kes semasa, bagaimanapun, hanya rujukan 'pasif' kepada penghubung: hanya nama/tajuk penghubung 'Walk With Us' kelihatan di bahagian kanan blog web bersama 85 nama/tajuk penghubung lain (lihat perenggan).]

Notes

For cases on committal proceedings, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1767–1792.

Cases referred to

Hird v Wood [1894] 34 SJ 234 (refd)

International Telephone Link Pty Limited and Anor v IDG Communications Limited & Anor (refd)

Legislation referred to

Rules of the High Court 1980 O 52 r 2

Rishwant Singh (Zul Rafique & Partners) for the applicants.

Mohd Hishamudin J:

[1] The first applicant is a public listed company registered in Kuala Lumpur. The first applicant's primary business is the publishing and selling of newspapers, examples of which are the *New Straits Times* and the *New Sunday Times*.

[2] The second applicant was at all material times the Deputy Chairman of the first applicant.

[3] The third applicant was as at 27 June 2006 a director of the first applicant, and at all material times the Group-Editor-in-Chief of the first applicant.

[4] The fourth applicant is a director and Chief Executive Officer of the first applicant.

[5] The fifth applicant was at all material times the Group Editor of the *New Straits Times* and the director of English Publications with the first applicant.

[6] The respondent is a journalist and an editorial consultant. The respondent was at one point in time an Executive Editor of the *Malay Mail* and *Sunday Mail*, and was, at all material times, President of the National Press Club.

[7] The application that is now before me is an ex parte application pursuant to O 52 r 2 of the Rules of the High Court 1980. The applicants here seek an order for leave to commence committal proceedings against the respondent.

[8] The relief that would be sought in the committal proceedings, if leave were to be granted, is for an order of committal to commit the respondent to prison for his various and several acts of contempt on the following grounds:

1 that there is a breach of the respondent's undertaking given to the High Court of Kuala Lumpur on 29 January 2007 in Civil Suit No S3–23–2 of 2007; and

2 that the respondent's action of linking his weblog to another weblog called 'Walk With Us' (http:/walkwithus.wordpress.com/).

The breach of undertaking

[9] In order to understand better the nature of the undertaking, I need to dwell briefly on the background facts. The applicants have jointly commenced an action against the respondent via High Court, Kuala Lumpur, Civil Suit No S3–23–2 of 2007 ('the S3 suit'). In that suit the applicants are the plaintiffs and the respondent the defendant. The S3 suit is a claim for libel and malicious falsehood against the respondent, Ahirudin bin Attan.

The claim is in relation to various articles, comments and posts published by the respondent on his weblog called the 'Rocky's Bru' weblog.

[10] The plaintiffs in the S3 action have applied for an interlocutory injunction to restrain the respondent from posting further or similar allegedly libelous statements concerning the plaintiffs. This interlocutory injunction application is presently pending, and it is in relation to this application that the undertaking of 29 January 2007 was given by both parties to court. The terms of the undertaking given to court on 29 January 2007 by all parties in the S3 suit are as follows:

[11] Parties agree to henceforth not publish any articles, comments or posts regarding the dispute presently before the High Court in this action that may be regarded as sub judice or that may prejudice the fair trial of the action.

[12] The applicants in the present proceeding allege that the respondent has breached his undertaking given to this court on 29 January 2007 by publishing the following articles, comments and posts on his weblog titled 'Rocky's Bru':

a An article titled 'Wrong Info on Kalimullah' dated 18 May 2007, and further publishing posts and comments thereto;

b An article titled 'Syed Ahmad Idid on Corruption' dated 21 May 2007, and further publishing posts and comments thereto;

c An article titled 'Samy does a Brenden Pereira' dated 10 June 2007, and further publishing posts and comments thereto;

d An article titled 'Kalimullah admits "It was incorrect"' dated 11 June 2007, and further publishing posts and comments thereto;

e An article titled 'Hisham's K&M a year down the road' dated 8 July 2007, and further publishing posts and comments thereto; and

f An article titled 'Datuk Seri who?' dated 8 July 2007 and further publishing posts and comments thereto;

[13] I accept the applicants' contention that by virtue of the undertaking given by the respondent in the S3 action, it was incumbent on the respondent not to publish any articles, comments or posts regarding the dispute presently before the High Court in the S3 action that may be regarded as sub judice or that may prejudice the fair trial of the action.

[14] However, having carefully examined the supporting statement of the application (the statement made pursuant to sub-r (2) of r 2 of O 52), in particular, paragraph 20, I am of the view that the applicants have failed to

explain clearly in what way that the articles and posts are of such a nature that they can be said to be 'regarding the dispute presently before the High Court'; or, even assuming that they can be said to be 'regarding the dispute presently before the High Court', in what way that they can be regarded as being sub judice or that they may prejudice the fair trial of the action. Rule 2(2) requires the applicants to set out in the supporting statement the grounds on which the committal is sought. In the present case I am not satisfied that the applicants have explained the grounds clearly. There is lacking in sufficient information.

[15] In para 21 of their supporting statement the applicants state:

> 21. The applicants will refer to the amended statement of claim filed in the S3 action at the hearing of this application for the details of the claim made therein and [will] compare [the] same [with] the new articles published by the respondent. The applicants will point out the above and other instances where the respondent breached its undertaking to court.

[16] In my judgment, in an ex parte application for leave to institute committal proceeding, the details and the comparisons, which the applicants intend to rely on, must be set out in the supporting statement itself and not to be explained separately by way of submission by counsel from the bar (be it orally or in writing). Every essential particular must be in the supporting statement itself and verified by an affidavit. These requirements must be strictly complied with. In any case, the skeletal written submission (encl A (1)) tendered by the learned counsel for the applicants, Encik Rishwant Singh, on the day of the hearing (20 September 2007), does not appear to contain the details or comparisons.

The 'Walk With Us' weblog hyperlink.

[17] It is also the contention of the applicants that, independently of the above-mentioned undertaking, the respondent is also guilty of contempt by maintaining a hyperlink on his weblog with the 'Walk With Us' weblog. The applicants maintain that as a matter of law and fact, the respondent's act in referring to and linking to the 'Walk With Us' weblog from his Rocky's Bru weblog, is a re-publication of the contents of the 'Walk With Us' weblog on the Rocky's Bru weblog.

[18] A hyperlink works in the following way. The name/title of the website/weblog B appears on website/weblog A, and the reader can have direct access to website/weblog B simply by clicking on the name/title of website/weblog B. Hyperlinks are usually highlighted by means of colour or underlining.

[19] It is alleged by the applicants that the 'Walk With Us' weblog contains discussions of the S3 suit and criticisms of the plaintiffs (the applicants herein) in that suit (and, to a lesser extent, criticisms of the plaintiffs' solicitors and counsel). It is alleged that the contents of the Walk With Us weblog interfere with, and prejudice, the course of justice. In my judgment, the respondent cannot be held liable over the contents of the Walk With Us weblog. He is neither the author nor the publisher of that weblog. The Walk With Us weblog is an anonymous weblog. The applicants, however, content that, although the respondent is not the author of the Walk With Us weblog, nonetheless, he must, as a matter of law, be taken to be the publisher of that weblog by reason of the hyperlink on his weblog which links the Walk With Us weblog with his weblog. For this proposition, the applicants rely on:

a the English Court of Appeal case of *Hird v Wood* [1894] 34 SJ 234; and

b the unreported judgment dated 19 January 1998 of a Master of the High Court of Auckland, New Zealand, in a case known as *International Telephone Link Pty Limited and Anor v IDG Communications Limited & Anor* [CP No 344/97].

[20] In my opinion, it is farfetched to contend that there is a republication by the respondent merely by reason of the hyperlink appearing in his weblog.

[21] To my mind, both the cases cited by learned counsel are irrelevant as the facts in those cases are different from the facts of the present case. In *Hird v Wood* the facts were that a man sat near a placard and directed the attention of passersby to the placard, which contained defamatory words. The Court held that the conduct of the man amounted to publication of the words in the placard. In International Telephone Link, the issue was whether the references in an article to a website (which allegedly contained defamatory statements) amounted to a republication of the website, and the Master, applying *Hird v Wood*, answered the question in the affirmative. It is significant to observe that neither of these cases concern hyperlinks. In International Telephone Link there are 'active' references to the website in question by the writer of the article. The article states:

> Kiwi uses Websites to outline troubles with entrepreneur.
>
> New Zealander David Leng, who claims he has been misled by an Australian entrepreneur, has used the Web to spell out details of a complex series of transactions which he says have left him and other locals seeking financial redress.
>
> Because of the way the contract was set up, Leng claims it is almost impossible to sue. Thus the multi-layered Website 'as a warning to others'.
>
> …
>
> David Leng's Website is www.nzpost.com/itl/introd.htm.

[22] In the present case, however, there is only a 'passive' reference to the hyperlink: only the name/title of the hyperlink 'Walk With Us' appears on the right hand column of the weblog together with the names/titles of about 85 other hyperlinks.

[23] In conclusion, I hold that the supporting statement of the applicants as set out pursuant to sub-r (2) of r 2 fails to disclose a prima facie case of contempt of this court.

Application dismissed.

Reported by Loo Lai Mee